

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.1775/M/2019
Assessment Year: 2014-15**

Shri Rakesh Shantilal Shah, 82 Block, 7 Badrikeshwar Co-op Hsg. Soc. Ltd., Netaji Subhash Road, Marine Drive, Mumbai – 400 002 PAN: AAEPS0951N	Vs.	ITO-18(3)(4), 608, 6 th Floor, Earnest House, Nariman Point, Mumbai – 400 021
(Appellant)		(Respondent)

Present for:

Assessee by : Shri B.V. Jhaveri, A.R.
Revenue by : Shri Raghuveer Madana, D.R.

Date of Hearing : 15.11.2021
Date of Pronouncement : 22.11.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 28.02.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2014-15.

2. The issue raised in ground No.1 & 2 is against the confirmation of addition of Rs.5,46,21,248/- as made by the AO under section 68 of the Act as unexplained cash credit as against the long term capital gain of Rs.5,38,89,313/- resulting from sale of equity shares which was claimed as exempt under section 10(38) of the Act.

3. The facts in brief are that the assessee filed return of income on 31.07.2014 declaring income of Rs.30,40,850/- after claiming exemption of income of Rs.5,40,65,381/- which also included long term capital gain on sale of listed shares of Rs.5,38,89,313/-. The assessee purchased 65,000 equity shares of M/s. Transcend Commerce Ltd. for a consideration of Rs.6,50,000/- on 16.10.2012 from Subh Mangal Sales Pvt. Ltd. at face value of Rs.10 each. The said shares were credited in the D-mat account of assessee with M/s. Kantilal Chaganlal Securities Pvt. Ltd. on 13.12.2012 along with other shareholdings of assessee. M/s. Transcend Commerce Ltd. was merged with M/s. S.R.K. Industries Ltd. as per the order of Hon'ble Bombay High Court dated 21.12.2012 and the assessee was allotted 1,44,300 shares of Rs.10 each of M/s. S.R.K. Industries Ltd. The said shares were subdivided and face value of the share was reduced to Rs.5 per share on 14.10.2013 and consequently the assessee was allotted 2,88,600 shares of M/s. S.R.K. Industries Ltd. These shares were sold at Stock Exchange Mumbai through registered broker M/s. Vishesh Capital Pvt. Ltd. between 16.12.2013 and 10.01.2014 and STT was paid. The total sale consideration realized from of sale of shares was Rs.5,46,21,248/-. The assessee after reducing the cost of purchase of Rs.6,50,000/- calculated the long term capital gain of Rs.5,38,89,313/- which was claimed as exempt under section 10(38) of the Act. The assessee filed before the AO various evidences, contract notes, D-mat account, payment through banking channel and payment proof of STT etc. however, the AO by referring to the investigation wing report came to the conclusion that all these transactions were bogus.

Finally, the AO added the entire sale consideration to the income of the assessee of Rs.5,46,21,248/- as unexplained under section 68 of the Act besides adding commission @ 0.25% thereby making an addition of Rs.1,36,553/-.

4. The assessee filed an appeal before Ld. CIT(A) which was dismissed by the appellate authority by observing and holding as under:

“4.1.6. In view of the elaborated discussion/analysis and conclusion of the A.O. in the Assessment order, the analysis of appellant's argument, principle laid down by the decision/judgements relied upon it is clear that the appellant has misutilized the provisions of section 10(38) of the Act. It is also clear that the appellant and individual whose main source of income is not dealing in shares had purchased shares of M/s. TCL offline from a company which was also managed by the entry operator. The company M/s. TCL was subsequently merged with M/s. SRK Industries Ltd and thereafter M/s. SRK Industries Ltd has split the aforesaid shares into Rs.5/- per share and appellant was allotted 2,88,600 equity shares in lieu of 1,44,300 shares. The A.O. has clearly brought out in detail that financial results of the company during the relevant period did not show any prospective growth. None of the parameters which are essential for increase of price of shares was present inspite of this if the share price is increased 23 times then it is definitely due to artificial increase. The AO has further established the manipulation in trading of shares as it was candidly admitted by the key persons that snares of M/s. SRK Industries Ltd are penny stock. In view of information provided by the investigation wing Kolkatta, the recommendation in SIT on Black money the A.O. required the appellant to prove his claim of exemption which the assessee has failed to do. The A.O, has clearly brought out a case of manipulation of sale of shares within a short span of time in collusion with brokers/entry providers in order to earn tax free exempt L.T.C.G. The scrip under reference is one of the 84 penny stock identified after widespread investigation by Directorate of Investigation Kolkatta. Thus the findings of enquiry/investigation report from Kolkata Investigation Wing are squarely applicable to the case of the appellant. Thus it is clear the action of the appellant is nothing but is premeditated contumacious conduct, surreptitiously done for specific reasons for converting unaccounted money of the appellant under the guise of Long Term Share Transaction claiming as exempt u/s.10(38) of the Act. This is clearly a tax evasion from the above analysed facts and surrounding circumstances, human conduct, preponderance of probability.

The A.O. has clearly established that the impugned transactions are not made for an investment i.e. the motive is not derive income but to earn profit that too, by an arrangement. It is a manipulated transaction in collusion with broker/entry operator to claim exemption u/s. 10(38) of the Act. This is in accordance with the ratio laid by the Hon'ble Apex Court in Sumati Dayal Vs.

Commissioner of Income-Tax, 214 ITR 801 (SC), that" the apparent must be considered the real until it is shown that there are reasons to believe that the apparent is not the real and that the taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. (CIT v. Durga Prasad More (1971)82 ITR 540 SC(at pages 545, 547). Further, the Hon'ble Apex Court in Kale Khan Mohammad Hanif Vs Commissioner of Income-Tax, M.P. and Bhopal in 50 ITR 1 (SC) held that "it is well established that the Onus of proving the source of a sum of money found to have been received by the assessee is on him, If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the, income tax Officer is entitled to treat it as taxable income see A.Govindarajulu Mudaliar v. Commissioner of Income-tax 34 ITR 807 SC.

In view of the above I, have no reasons to interfere with the conclusion of the A.O. Thus the addition of Rs.5,46,21,248/- as cash credit u/s.68 of the Act is upheld and ground of appeal on this issue is Dismissed."

5. The Ld. A.R. vehemently argued before the Bench that the capital gain arising from sale of shares of M/s. S.R.K. Industries Ltd. was in fact genuine and has resulted from sale of shares made on recognized stock exchange of Bombay through registered broker M/s. Vishesh Capital Pvt. Ltd. between 16.12.2013 to 10.01.2014. The Ld. A.R. submitted that the sale of shares was duly supported with contract notes issued by M/s. Vishesh Capital Ltd. and sale proceeds received were duly credited in the bank account of the assessee after reducing security transactions tax and brokerage. The Ld. A.R. submitted that assessee has filed all the evidences for purchase and sale of shares as to how the shares were initially purchased and subsequent allotment of shares by amalgamated company M/s. S.R.K. Industries Ltd. and the further sub division of shares of face value of Rs.10 each to Rs.5 per share. The Ld. A.R. submitted that the AO has not pointed out any defects in the evidences filed by the assessee before the lower authorities and the AO and CIT(A) have merely relied on the investigation wing report that these were bogus share transactions. The Ld. A.R.

submitted that once the assessee has filed all the evidences such as proof of sale and purchase, contract notes, transactions through banking channels and payment of STT etc. then the mere fact that the scrip has risen many time can not be a sole ground for treating the transactions as bogus. The Ld. A.R. in defense of his arguments relied on a series of decisions namely;

1. Smt. Geeta Khare vs. ACIT in ITA No.4267/M/2018 A.Y. 2014-15 and Sashikant B. Mhatre HUF ITA No.694/M/2018 order dated 29.05.2019
2. Smt. Bhavna B. Kothari vs. ITO in ITA No.3740/M/2019 order dated 11.09.2020

The Ld. A.R. submitted that in both the above decisions the same scrip of M/s. S.R.K. Industries Ltd. was involved and was decided in favour of the assessee. The Ld. A.R. also relied on a series of other decisions namely;

- (1) Sailesh Jain HUF vs. ITO in ITA No.6068/M/2019 A.Y. 2014-15
- (2) Ramprasad Agarwal vs. ITO 100 taxman.com 172 Mumbai
- (3) ITO vs. M/s. Arvind Kumar Jain HUF in ITA No.4862/M/2014 order dated 18.09.2017.

The Ld. A.R. submitted that in all the above decisions the co-ordinate Bench of the Tribunal has held that where assessee has filed all evidences of purchase and sale, cover notes, payment proof, D-mat account etc. and AO has simply relied on the report of the investigation wing report that scrip price has increased manifold, the long term capital gain can not be held to be bogus. The Ld. A.R. therefore prayed that the ground 1 & 2 raised by the assessee may kindly be allowed.

6. The Ld. D.R., on the other hand, relied heavily on the order of authorities below and submitted that the racket of penny

stocks have been brought to light by the investigation wing of the department that such shares were used to give accommodation in the form of long term capital gain, unsecured loans and bogus share capital. The Ld. D.R. submitted that the mere fact that the assessee filed all the evidences qua purchase and sale of shares comprising contract notes, payment through banking channels, D-mat account etc. and sale on recognized exchange would not ipso facto prove the genuineness of the transactions when the penny stocks are held to be of bogus nature and used to give accommodation entries. The Ld. D.R. submitted that the racket of bogus long term capital gain runs into thousands of crores as brought out by the investigation team and therefore the sale consideration of such shares was rightly added under section 68 of the Act. The Ld. D.R. finally prayed before the Bench that the order of Ld. CIT(A) may kindly be confirmed by dismissing the appeal of the assessee.

7. After hearing both the parties and perusing the material on record, we find that the assessee has sold 2,88,600 shares of M/s. S.R.K. Industries Ltd. at Bombay Stock Exchange through broker M/s. Vishesh Capital Pvt. Ltd. dated 16.12.2013 and 10.01.2014. The facts qua the purchase of these shares were already discussed hereinabove. We note that the assessee has filed before the AO the proofs of purchase and sale of these shares, payment through banking channel, receipt of sale consideration into assessee's bank account, sale through registered brokers on stock exchange and D-mat account regarding the entries of purchase and sale of these shares etc. We further note that the AO has not found any defect in the documents submitted by the assessee, however, primarily relied

on the report of investigation wing, Kolkata that the scrip is part of penny stocks and therefore are of bogus in nature. In our opinion, the order of Ld. CIT(A) upholding the order of AO is not correct as the conclusion is merely based on the suspicious without bringing on record any concrete evidences to the contrary. As the long term capital gain which was earned through recognized stock exchange and is evidenced by the documentary evidences and mere fact that the scrip price has risen many times can not be sole factor for treating the same as bogus. We also note that the co-ordinate Bench of the Tribunal in the above two cases namely Smt. Geeta Khare vs. ACIT (supra) and Smt. Bhavna B. Kothari vs. ITO (supra), the scrip involved was M/s. S.R.K. Industries Ltd. and the co-ordinate Bench of the Tribunal has held the long term capital gain to be genuine and not bogus. The operative part in the case of Smt. Geeta Khare vs. ACIT (supra) is extracted below:

“7. We have heard the rival submissions. The primary facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that the Id AO had placed reliance on certain statements recorded by the Investigation wing of Kolkata Income Tax Department during some survey proceedings conducted in third party cases. We find that in none of those statements, the name of the assessee or the name of the brokers through whom assessee had transacted were mentioned. We also find that there is no mention of any connivance on the part of the assessee with the share broker and stock exchange to launder the unaccounted monies of the assessee and bring it back in the form of sale proceeds of shares and claim exemption u/s 10(38) of the Act for the long term capital gains derived thereon. None of the parties on whom survey actions were conducted were related to assessee or the brokers in any manner whatsoever. We find that the various purchase and sale details together with the supporting evidences were not controverted by the revenue before us. The revenue had not brought on record any adverse order passed by SEBI linking the assessee or her broker with the alleged price rigging and manipulation. Hence there is absolutely no iota of evidence linking the assessee or the registered brokers to even remotely allege that they were involved in artificial rigging of price of scrips which were dealt by the assessee herein. The statements of various operators were recorded by the Id AO and the same are reproduced in the assessment order. But nowhere in those statements, the name of the assessee or the broker through whom the assessee dealt with regard to sale of shares were even remotely

mentioned by those operators. We find from perusal of the assessment order, there is no mention or reference as to whether these statements were even provided to the assessee for his verification and seek for cross examination, if any. Hence it could be safely concluded that these statements were taken behind the back of the assessee and were never put to the assessee for his rebuttal. Hence no evidentiary value could be attached to those statements. We find that the statement was recorded on oath u/s 131 of the Act from the assessee during the course of assessment proceedings by the Id AO, but no questions regarding the statements obtained from entry operators were even put to the assessee by the Id AO.

7.1. On analysis of price movements of shares of SRK Industries Ltd , we find that as per the data relied upon by the Id AO in his assessment order, the total number of shares traded in respect of this scrip in the entire market from Feb 2012 (i.e the time of purchase of shares by the assessee herein) to Jan 2014 (i.e the time of sale of shares by the assessee herein) was 40254365 shares. Whereas the same transactions from Feb 2014 to Dec 2015 were 82818409 shares. This will be clear from the following table:-

<u>Upto Jan 2014</u>	<u>Jan 14 to Dec-15</u>
<u>No. of Shares traded</u>	<u>No. of Shares traded</u>
100	4778156
500	20544716
200	1200905
100	2982153
300	558044
100	48031
35	25842
62156	188670
528	1755017
172	5965728
941	4542919
219901	800299
445841	2361304
134745	4568884
863657	2135413
2220786	3212730
2208340	4916774
4197610	3271357
6277016	5489375
10156920	9210300
13464417	4243196
	3659
	14937

Total 40254365 82818409

7.1.1. From the above tabulation, it could be seen that the assessee had exited from the market by selling the shares once there was heavy selling of the shares of SRK Industries Ltd on the fear element being setting in for further reduction of prices. We find that these after Jan 2014, these shares were heavily traded in the open market. In any case, it is not for the revenue to decide as to at what time the assessee should exit from his holding of shares in the open market. It is for the assessee to decide. The revenue cannot step into the shoes of the assessee and decide the purchase and sale transactions of shares and the timing together with the pricing thereon. Reliance in this regard is placed has been rightly placed by the Id AR on the decision of Hon'ble Supreme Court in the case of CIT vs Dhanrajgiri Raja Narasingirji reported in 91 ITR 544 (SC).

7.2. We find that the Id AR pleaded that in an online platform, there would be no nexus between the purchasers and the seller and the delivery of shares and payments would be made through their respective stock brokers. Hence the Id AO ought to have summoned the assessee's brokers to examine the authenticity of the sale of shares of SRK Industries Ltd and the amount received on sale of shares. We find that the Id AR also placed evidences on record to prove that the said company SRK Industries Ltd is still listed in the stock exchange and shares of this company are being traded and SEBI had not passed any adverse order against the said company either suspending the trading of the scrip or banning the scrip. Moreover, the Id AR also placed on record the letter dated 14.2.2019 addressed by SRK Industries Ltd to Bombay Stock Exchange informing the outcome of the Board Meeting held on 14.2.2019 approving the unaudited standalone financial results of SRK Industries Ltd for the quarter ended 31st December 2018 in the format prescribed by SEBI listing norms and the stock exchange. From the said quarterly financials, we find that SRK Industries Ltd revenue from operations for the quarter ended Dec 2018 was Rs 30.61 crores which clearly shows that it is an operational company and not merely a company having no value as alleged by the revenue before us to make it fall under the category of 'penny stock'. Moreover, the status of this company M/s SRK Industries Ltd in the website of Ministry of Corporate Affairs as on 26.2.2019 is still shown under the category of 'Active'. In the said status report of website of ministry of corporate affairs, we find that the fixed assets and current assets of SRK Industries Ltd were subjected to some charge or encumbrance with certain loan creditors and the said charge on assets were also duly cleared by SRK Industries Ltd subsequently. This is evident from the status report mentioned therein as 'closed'. These facts go to prove beyond doubt that SRK Industries Ltd is an operational company even as on 26.2.2019.

7.3. We find that the Id AO sought to identify the alleged purchasers of shares from the assessee and issued notices u/s 133(6) of the Act to all of them. All the notices sent through speed post returned unserved. Based on this, adverse inference was drawn by the Id AO on the assessee. We find that the Id AR had already submitted that in an online platform of trading of shares in the open market through a registered stock broker, it is not possible for the assessee to even know the name and address of the purchasers when the assessee sells the shares in the open

market. In any case, merely because the alleged purchasers list given by the Id AO in his assessment order had not responded to notice u/s 133(6) of the Act, no adverse inference could be drawn on the assessee for the default committed by those alleged purchasers. The Id AO could have very well resorted to issuance of summons u/s 131 of the Act to those alleged purchasers and / or take necessary action on them in the manner known to law for non-compliance from their side. We hold that the assessee need not discharge her onus of bringing on record the alleged purchasers especially when the shares were sold in the open market in an online platform. Accordingly, the assessee need not prove the identity, creditworthiness of those alleged purchasers of shares and the genuineness of transactions within the meaning of section 68 of the Act. The assessee has received the sale proceeds of shares from her broker M/s Sharekhan Limited. The assessee had shown the credit in the name of M/s Sharekhan Limited in her books. Hence the assessee had duly discharged her onus by furnishing the entire sale details made through the registered stock broker M/s Sharekhan Limited. We find that the Id AO had not even bothered to make any enquiry with M/s Sharekhan Limited to understand these facts. Hence no fault could be attributed on the assessee in this regard. We find that none of the purchase and sale details with supporting evidences were found to be deficient in any manner whatsoever either by the Id AO or by the Id CITA.

7.4. We find that the assessee was duly examined on oath u/s 131 of the Act during the course of assessment proceedings on 29.11.2016 which fact is also mentioned in Page 26 of the Assessment Order. In the said statement, the assessee in reply to Question No. 9 had categorically stated that she had been making investments in capital market and equity shares through broker M/s Sharekhan Limited and through relatives and friends. The assessee had also categorically replied in response to Question No. 13 that the investment in shares of SRK Industries Ltd (Transcend Commerce Ltd prior to merger) was made based on the advice of her friend Shri Shivajirao Jondhale. The assessee in reply to Question No. 17 had also stated that she did not make any enquiry about the financial condition of the shares of SRK Industries Ltd but she was told by Shri Shivajirao Jondhale that the value of the shares would get appreciated. This was the sole basis of the assessee making the investment in shares of Transcend Commerce Ltd (Later merged with SRK Industries Ltd) which cannot be doubted at all. In our considered opinion, it cannot be said that all the investment decisions of the assessee would be prudent and would be done only after analyzing the entire fundamentals and financials of the investee company. It is in everybody's knowledge, that an investor would try to take calculated risks by investing his money on an unknown scrip based on certain information from friends, relatives, or in some stock market related websites and take a chance. Since the scrip purchased by the assessee was showing considerable growth from the time of purchase, the assessee being a gullible investor continued to hold it for a period of 14 months and later sold it in open market in online platform at prevailing market prices.

7.5. We find that the Id AO had observed that the assessee had traded only in the shares of SRK Industries Ltd. This is factually incorrect statement of the Id AO. Moreover, the Id AO had during the course of examination of the assessee on oath u/s 131 of the Act had even posed a question vide Question No. 24 that assessee

had purchased very few shares of well reputed companies during the year like Indus Ind Bank, Crompton Greaves, Larsen and Toubro etc. We find that the Id AO in para 13.4 of his order had observed that on examination of Shri Shivajirao Jondhale on oath u/s 131 of the Act, it was noticed that he had also invested in the shares of SRK Industries Ltd only based on an advice of his friend. Based on this, the Id AO had concluded that the whole basis of purchase of this share is a preknowledge of rigging of price and subsequently taking accommodation entry for Long term capital gains. We find from the demat statements for the period 1.4.2012 to 31.3.2013 and 1.4.2013 to 31.3.2014, the assessee had dealt in various reputed scrips and had duly dematted the same and all these transactions are duly reflected in the demat statements issued by the depository participant.

7.6. We find that the Id DR made general submissions with regard to the investigations carried out by Kolkata Income Tax Department after identifying 84 scrips to be penny stocks and the modus operandi adopted by those scrips with the connivance of various entry operators, brokers and stock exchange. We find that the Id DR was not specifically able to controvert the documentary evidences filed by the assessee for purchase and sale of shares and various other documents referred to in the Paper Book. The Id DR also filed written submissions wherein he had reiterated the findings of the Id AO.

7.7. We find that the co-ordinate bench of Kolkata Tribunal in ITA No.661/Kol/ 2018 in Shreyans Chopra vs ACIT dated 25.7.2018 on similar set of facts and circumstances had held as follows:-

“IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA ‘SMC’ BENCH, KOLKATA

(Before Sri J. Sudhakar Reddy, Accountant Member)

ITA No. 661/Kol/2018
Assessment Year: 2014-15

Shri Shreyans Chopra Appellant
3A, Mangoe Lane
Kolkata – 700 001
[PAN : AAAFZ 1337 P]

Assistant Commissioner of Income Tax, Circle-36, Kolkata.....Respondent

Appearances by:

Shri Miraj D. Shah A/R, appeared on behalf of the assessee.

Shri Satyajit Mandal, Addl. CIT, D/R. appearing on behalf of the Revenue.

Date of concluding the hearing : June 28th, 2018

Date of pronouncing the order : July 25th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals)-10, Kolkata, (hereinafter the „Ld. CIT(A)“), dt. 15/02/2018, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the „Act“), relating to Assessment Year 2014-15.

2. The assessee is an individual and derives income from business, professional capital gains and other sources. The facts of the case and the issues involved in this appeal are brought out by the Assessing Officer at paragraphs 3 & 4 of the assessment order, which is extracted for ready reference:-

“3. Brief facts of the case: The assessee has filed his/her return showing income from salary of Rs.84,000/- & income from other sources of Rs.6,12,677/-. However, in its computation of income the assessee has computed LTCG of Rs.5,50,159/- and claimed exemption u/s 10(38) of the I. T. Act. Therefore, all of a sudden earning of such huge exempted income from LTCG requires for examination in detail.

Return data analysis of past years shows the following picture:-

Assessment Year	Income from salary	Short Term Capital Gain	Income from other Source	Gross Total Income	Total Income	Exempt LTCG
2012-13	0	0	8,63,168	8,63,168	7,43,168	NIL
2013-14	2,40,000	0	3,98,213	6,38,213	5,36,940	NIL
2014-15	0	4,80,227	6,12,677	11,76,904	10,61,900	5,50,158

4. Main issues involved: The main reason for selection of scrutiny of this case was to examine the earning of suspicious capital gain from transaction in penny stock (input given by Investigation wing). In course of scrutiny, it is seen that assessee had shown income from Long Term Capital Gains from sale of shares of M/s SRK Industries Ltd. to the tune of Rs.5,50,158/- on sales of shares for Rs.5,57,658/-. This Long Term Capital gain was claimed exempt from Income tax. The assessee had declared following calculation regarding income from long term capital gain on sale of shares exempt from taxation u/s 10(38):

Name of Company	Sale price	Purchase price	Exempt u/s 10(38)
SRK Industries Ltd.	5,57,658	7,500	5,50,158

Shares were purchased off market @7,500/- but their value increased later in pursuant to order dated 21/12/2013 of Bombay High Court and order dated 21/02/2013 of Madras High Court vide letter no. SRK/SA/elec/ 000771/2013 dated 20.05.2013.

In course of the assessment, the assessee was asked to furnish the details of such share transactions.

3. The Assessing Officer in his detailed order discussed the modus operandi as well as the other evidences available with him and, thereafter, at para 6 & 7, concluded as follows:-

“6. Thus in view of the elaborate discussion made above, I hereby hold the amount of Rs.5,57,658/- introduced/credited by the assessee out of these purported share sale receipts during the Financial Year 2013-14 (AY 2014- 15) in his capital account as his income being unexplained cash credit u/s 68 of the Income Tax Act (taxable at the rate of 30% as provided u/s 115BBE). Therefore, an amount of Rs.5,57,658/- is added back with the total income of the assessee u/s 68 of the I.T. Act as unexplained cash credit during the relevant year.

[Addition: Rs.5,57,658/-]

7. Under the circumstances, Rs.5,50,158/- is treated as bogus and also a sum of Rs.27,508/- being 5% of Rs.5,50,158/- is added as undisclosed expenditure within the meaning of section 69C of the Income-tax Act, 1961.

[Addition of Rs.27,508/-
]”

4. On appeal, the Id. First Appellate Authority, has classified these transactions as „suspicious“ and confirmed the order of the Assessing Officer.

5. Aggrieved, the assessee is in appeal before us.

6. I have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, I hold as follows:-

6.1. Recently, the Kolkata „C“ Bench of the Tribunal in the case of Navneet Agarwal,-vsITO, Ward-35(3), Kolkata; I.T.A. No. 2281/Kol/2017; Assessment Year: 2014-15, while dealing with identical issue of sale of shares decided the issue in favour of the assessee by relying upon a plethora of judgments of various Courts. It held as follows:-

“12. The assessing officer as well as the Ld. CIT(A) have rejected these evidences filed by the assessee by referring to “Modus Operandi” of persons for earning long term capital gains which his exempt from income tax. All these observations are general in nature and are applied across the board to all the 60,000 or more assesseees who fall in this category. Specific evidences produced by the assessee are not controverted by the revenue authorities. No evidence collected from third parties is confronted to the assesseees. No opportunity of cross-examination of persons, on whose statements the revenue relies to make the addition, is provided to the assessee. The addition is made based on a report from the investigation wing.

13. The issue for consideration before us is whether, in such cases, the legal evidence produced by the assessee has to guide our decision in the matter or the general observations based on statements, probabilities, human behavior and discovery of the modus operandi adopted in earning alleged bogus LTCG and STCG, that have surfaced during investigations, should guide the authorities in arriving at a conclusion as to whether the claim is genuine or not. An alleged scam might have taken place on LTCG etc. But it has to be established in each case, by the party alleging so, that this assessee in question was part of this scam. The chain of events and the live link of the assessee’s action giving her involvement in the scam should

be established. The allegation imply that cash was paid by the assessee and in return the assessee received LTCG, which is income exempt from income tax, by way of cheque through Banking channels. This allegation that cash had changed hands, has to be proved with evidence, by the revenue. Evidence gathered by the Director Investigation"s office by way of statements recorded etc. has to also be brought on record in each case, when such a statement, evidence etc. is relied upon by the revenue to make any additions. Opportunity of cross examination has to be provided to the assessee, if the AO relies on any statements or third party as evidence to make an addition. If any material or evidence is sought to be relied upon by the AO, he has to confront the assessee with such material. The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department.

14. It is well settled that evidence collected from third parties cannot be used against an assessee unless this evidence is put before him and he is given an opportunity to controvert the evidence. In this case, the AO relies only on a report as the basis for the addition. The evidence based on which the DDIT report is prepared is not brought on record by the AO nor is it put before the assessee. The submission of the assessee that she is just an investor and as she received some tips and she chose to invest based on these market tips and had taken a calculated risk and had gained in the process and that she is not party to the scam etc., has to be controverted by the revenue with evidence. When a person claims that she has done these transactions in a bona fide and genuine manner and was benefitted, one cannot reject this submission based on surmises and conjectures. As the report of investigation wing suggests, there are more than 60,000 beneficiaries of LTCG. Each case has to be assessed based on legal principles of legal import laid down by the Courts of law.

15. In our view modus operandi, generalisation, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected by the assessee. The Hon'ble Supreme Court in the case of Omar Salav Mohamed Sait reported in (1959) 37 ITR 151 (S C) had held that no addition can be made on the basis of surmises, suspicion and conjectures. In the case of CIT(Central), Kolkata vs. Daulat Ram Rawatmull reported in 87 ITR 349, the Hon'ble Supreme Court held that, the onus to prove that the apparent is not the real is on the party who claims it to be so. The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an interference to that effect. The Hon'ble Supreme Court in the case of Umacharan Shah & Bros. Vs. CIT 37 ITR 271 held that suspicion however strong, cannot take the place of evidence.

16. We find that the assessing officer as well as the Ld. CIT(A) has been guided by the report of the investigation wing prepared with respect to bogus capital gains transactions. However we do not find that, the assessing officer as well as the Ld. CIT(A), have brought out any part of the investigation wing report in which the

assessee has been investigated and /or found to be a part of any arrangement for the purpose of generating bogus long term capital gains. Nothing has been brought on record to show that the persons investigated , including entry operators or stock brokers, have named that the assessee was in collusion with them. In absence of such finding how is it possible to link their wrong doings with the assessee. In fact the investigation wing is a separate department which has not been assigned assessment work and has been delegated the work of only making investigation. The Act has vested widest powers on this wing. It is the duty of the investigation wing to conduct proper and detailed inquiry in any matter where there is allegation of tax evasion and after making proper inquiry and collecting proper evidences the matter should be sent to the assessment wing to assess the income as per law. We find no such action executed by investigation wing against the assessee. In absence of any finding specifically against the assessee in the investigation wing report, the assessee cannot be held to be guilty or linked to the wrong acts of the persons investigated. In this case, in our view, the Assessing Officer at best could have considered the investigation report as a starting point of investigation. The report only informed the assessing officer that some persons may have misused the script for the purpose of collusive transaction. The Assessing Officer was duty bound to make inquiry from all concerned parties relating to the transaction and then to collect evidences that the transaction entered into by the assessee was also a collusive transaction. We, however, find that the Assessing Officer has not brought on record any evidence to prove that the transactions entered by the assessee which are otherwise supported by proper third party documents are collusive transactions.

17. The Hon^{ble} Supreme Court way back in the case of Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288 (SC) held that assessment could not be based on background of suspicion and in absence of any evidence to support the same. The Hon^{ble} Court held:

“Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The cancellation of the food grain licence at Nawgachia and the prosecution of the appellant under the Defence of India Rules was also of no consequence inasmuch as the appellant was acquitted of the offence with which it had been charged and its licence also was restored. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the Income-tax Officer and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,---this also was a pure conjecture or surmise on the part of the Income-tax Officer. As regards the disclosed volume of business in the year under consideration in the head office and in branches the Income-tax Officer indulged in speculation when he talked of the possibility of the appellant earning a

considerable sum as against which it showed a net loss of about Rs. 45,000. The Income-tax Officer indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the Income-tax Officer was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each”.

The observations of the Hon^{ble} Apex Court are equally applicable to the case of the assessee. In our view the assessing officer having failed to bring on record any material to prove that the transaction of the assessee was a collusive transaction could not have rejected the evidences submitted by the assessee. In fact in this case nothing has been found against the assessee with aid of any direct evidences or material against the assessee despite the matter being investigated by various wings of the Income Tax Department hence in our view under these circumstances nothing can be implicated against the assessee.

18. We now consider the various propositions of law laid down by the Courts of law. That cross-examination is one part of the principles of natural justice has been laid down in the following judgments:

a) Ayaubkhan Noorkhan Pathan vs. The State of Maharashtra and Ors.

“23. A Constitution Bench of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan* AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: *Union of India v. T.R. Varma*, AIR 1957 SC 882; *Meenglas Tea Estate v. Workmen*, AIR 1963 SC 1719; *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar and Ors.*, AIR 1964 SC 708; *New India Assurance Co. Ltd. v. Nusli Neville Wadia and Anr.* AIR 2008 SC 876; *Rachpal Singh and Ors. v. Gurmit Singh and Ors.* AIR 2009 SC 2448; *Biecco Lawrie and Anr. v. State of West Bengal and Anr.* AIR 2010 SC 142; and *State of Uttar Pradesh v. Saroj Kumar Sinha* AIR 2010 SC 3131).

24. In *Lakshman Exports Ltd. v. Collector of Central Excise* (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question

had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. audi alteram partem.

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. He can therefore, do so by cross-examining the witnesses produced against him. The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In *Rajiv Arora v. Union of India and Ors.* AIR 2009 SC 1100, this Court held: Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.”

b) *Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II* wherein it was held that:

“4. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the Assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

5. According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the Assessee was adversely affected. It is to be borne in mind that the order

of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the Assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.

6. As mentioned above, the Appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

7. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the show cause notice.”

19. On similar facts where the revenue has alleged that the assessee has declared bogus LTCG, it was held as follows:

a) The CALCUTTA HIGH COURT in the case of BLB CABLES & CONDUCTORS [ITA No. 78 of 2017] dated 19.06.2018. The High Court held vide Para 4.1:

“.....we find that all the transactions through the broker were duly recorded in the books of the assessee. The broker has also declared in its books of accounts and offered for taxation. In our view to hold a transaction as bogus, there has to be some concrete evidence where the transactions cannot be proved with the supportive evidence. Here in the case the transactions of the commodity exchanged have not only been explained but also substantiated from the confirmation of the party. Both the parties are confirming the transactions which have been duly supported with the books of accounts and bank transactions. The Id. AR has also submitted the board resolution for the trading of commodity

transaction. The broker was expelled from the commodity exchange cannot be the criteria to hold the transaction as bogus. In view of above, we reverse the order of the lower authorities and allow the common grounds of assessee's appeal."

[quoted verbatim]

This is essentially a finding of the Tribunal on fact. No material has been shown to us who would negate the Tribunal's finding that off market transactions are not prohibited. As regards veracity of the transactions, the Tribunal has come to its conclusion on analysis of relevant materials. That being the position, Tribunal having analyzed the set of facts in coming to its finding, we do not think there is any scope of interference with the order of the Tribunal in exercise of our jurisdiction under Section 260A of the Income Tax Act, 1961. No substantial question of law is involved in this appeal. The appeal and the stay petition, accordingly, shall stand dismissed."

b) The JAIPUR ITAT in the case of VIVEK AGARWAL [ITA No. 292/JP/2017] order dated 06.04.2018 held as under vide Page 9 Para 3:

"We hold that the addition made by the AO is merely based on suspicion and surmises without any cogent material to controvert the evidence filed by the assessee in support of the claim. Further, the AO has also failed to establish that the assessee has brought back his unaccounted income in the shape of long term capital gain. Hence we delete the addition made by the AO on this account."

c) The Hon'ble Punjab and Haryana High Court in the case of PREM PAL GANDHI [ITA95-2017 (O&M)] dated 18.01.2018 at vide Page 3 Para 4 held as under:

"..... The Assessing Officer in both the cases added the appreciation to the assessee's income on the suspicion that these were fictitious transactions and that the appreciation actually represented the assessee's income from undisclosed sources. In ITA-18-2017 also the CIT (Appeals) and the Tribunal held that the Assessing Officer had not produced any evidence whatsoever in support of the suspicion. On the other hand, although the appreciation is very high, the shares were traded on the National Stock Exchange and the payments and receipts were routed through the bank. There was no evidence to indicate for instance that this was a closely held company and that the trading on the National Stock Exchange was manipulated in any manner."

The Court also held the following vide Page 3 Para 5 the following:

"Question (iv) has been dealt with in detail by the CIT (Appeals) and the Tribunal. Firstly, the documents on which the Assessing Officer relied upon in the appeal were not put to the assessee during the assessment proceedings. The CIT (Appeals) nevertheless considered them in detail and found that there was no co-relation between the amounts sought to be added and the entries in those documents. This was on an appreciation of facts. There is nothing to indicate that the same was perverse or irrational. Accordingly, no question of law arises."

d) The BENCH "D" OF KOLKATA ITAT in the case of GAUTAM PINCHA [ITA No.569/Kol/2017] order dated 15.11.2017 held as under vide Page 12 Para 8.1:

"In the light of the documents stated i.e. (I to xiv) in Para 6(supra) we find that there is absolutely no adverse material to implicate the assessee to have entered gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the Id. DR could not controvert the facts supported with material evidences which are on record and could only rely on the orders of the AO/CIT (A). We note that in the absence of material/evidence the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore also fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. These evidences were neither found by the AO nor by the Id. CIT (A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee that income from LTCG is exempted u/s 10(38) of the Act."

Further in Page 15 Para 8.5 of the judgment, it held:

"We note that the Id. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the Id. AR (supra) and have been duly considered by us to arrive at our conclusion. The Id. DR could not bring to our notice any case laws to support the impugned decision of the Id. CIT (A)/AO. In the aforesaid facts and circumstances of the case, we hold that the Id. CIT (A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We, therefore, direct the AO to delete the addition."

e) The BENCH "D" OF KOLKATA ITAT in the case of KIRAN KOTHARI HUF [ITA No. 443/Kol/2017] order dated 15.11.2017 held vide Para 9.3 held as under:

"..... We find that there is absolutely no adverse material to implicate the assessee to the entire gamut of unfounded/unwarranted allegations leveled by the AO against the assessee, which in our considered opinion has no legs to stand and therefore has to fall. We take note that the Id. DR could not controvert the facts which are supported with material evidences furnished by the assessee which are on record and could only rely on the orders of the AO/CIT(A). We note that the allegations that the assessee/brokers got involved in price rigging/manipulation of shares must therefore consequently fail. At the cost of repetition, we note that the assessee had furnished all relevant evidence in the form of bills, contract notes, demat statement and bank account to prove the genuineness of the transactions relevant to the purchase and sale of shares resulting in long term capital gain. Neither these evidences were found by the AO nor by the Id. CIT(A) to be false or fictitious or bogus. The facts of the case and the evidence in support of the evidence clearly support the claim of the assessee that the transactions of the

assessee were genuine and the authorities below was not justified in rejecting the claim of the assessee exempted u/s 10(38) of the Act on the basis of suspicion, surmises and conjectures. It is to be kept in mind that suspicion how so ever strong, cannot partake the character of legal evidence.

It further held as follows:

“We note that the Id. AR cited plethora of the case laws to bolster his claim which are not being repeated again since it has already been incorporated in the submissions of the Id. AR (supra) and have been duly considered to arrive at our conclusion. The Id. DR could not bring to our notice any case laws to support the impugned decision of the Id. CIT(A)/AO. In the aforesaid facts and circumstances of the case, we hold that the Id. CIT(A) was not justified in upholding the addition of sale proceeds of the shares as undisclosed income of the assessee u/s 68 of the Act. We therefore direct the AO to delete the addition.”

f) The BENCH “A” OF KOLKATA ITAT in the case of SHALEEN KHEMANI [ITA No. 1945/Kol/2014] order dated 18.10.2017 held as under vide Page 24 Para 9.3:

“We therefore hold that there is absolutely no adverse material to implicate the assessee to the entire gamut of unwarranted allegations leveled by the Id AO against the assessee, which in our considered opinion, has no legs to stand in the eyes of law. We find that the Id DR could not controvert the arguments of the Id AR with contrary material evidences on record and merely relied on the orders of the Id AO. We find that the allegation that the assessee and / or Brokers getting involved in price rigging of SOICL shares fails. It is also a matter of record that the assessee furnished all evidences in the form of bills, contract notes, demat statements and the bank accounts to prove the genuineness of the transactions relating to purchase and sale of shares resulting in LTCG. These evidences were neither found by the Id AO to be false or fabricated. The facts of the case and the evidences in support of the assessee’s case clearly support the claim of the assessee that the transactions of the assessee were bonafide and genuine and therefore the Id AO was not justified in rejecting the assessee’s claim of exemption under section 10(38) of the Act.”

g) The BENCH “H” OF MUMBAI ITAT in the case of ARVIND KUMAR JAIN HUF [ITA No.4682/Mum/2014] order dated 18.09.2017 held as under vide Page 6 Para 8:

“.....We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT (A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned with any way of the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular broker or share was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal

and Co. never stated any of the authority that transactions in M/s Ramkrishna Fincap Pvt. Ltd. On the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT (A) after relying on the various decision of the coordinate bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT (A) at para 3 to 5 has not been controverted by the department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT (A).”

h) The Hon“ble Punjab and Haryana High Court in the case of VIVEK MEHTA [ITA No. 894 OF 2010] order dated 14.11.2011 vide Page 2 Para 3 held as under:

“On the basis of the documents produced by the assessee in appeal, the Commissioner of Income Tax (Appeal) recorded a finding of fact that there was a genuine transaction of purchase of shares by the assessee on 16.3.2001 and sale thereof on 21.3.2002. The transactions of sale and purchase were as per the valuation prevalent in the Stocks Exchange. Such finding of fact has been recorded on the basis of evidence produced on record. The Tribunal has affirmed such finding. Such finding of fact is sought to be disputed in the present appeal. We do not find that the finding of fact recorded by the Commissioner of Income Tax in appeal, gives give rise to any question(s) of law as sought to be raised in the present appeal. Hence, the present appeal is dismissed.”

i) The Hon“ble Jurisdictional Calcutta High Court in the case of CIT vs. Bhagwati Prasad Agarwal in I.T.A. No. 22/Kol/2009 dated 29.04.2009 at para 2 held as follows:

“The tribunal found that the chain of transaction entered into by the assessee have been proved, accounted for, documented and supported by evidence. The assessee produced before the Commissioner of Income Tax(Appeal) the contract notes, details of his Demat account and, also, produced documents showing that all payments were received by the assessee through bank.”

j) The Hon“ble Supreme Court in the case of PCIT vs. Teju Rohitkumar Kapadia order dated 04.05.2018 upheld the following proposition of law laid down by the Hon“ble Gujrat High Court as under:

“It can thus be seen that the appellate authority as well as the Tribunal came to concurrent conclusion that the purchases already made by the assessee from Raj Impex were duly supported by bills and payments were made by Account Payee cheque. Raj Impacts also confirmed the transactions. There was no evidence to show that the amount was recycled back to the assessee. Particularly, when it was found that the assessee the trader had also shown sales out of purchases made from Raj Impex which were also accepted by the Revenue, no question of law arises.”

20. Applying the proposition of law laid down in the above judgments to the facts of this case we are bound to consider and rely on the evidence produced by the assessee in support of its claim and base our decision on such evidence and not on

suspicion or preponderance of probabilities. No material was brought on record by the AO to controvert the evidence furnished by the assessee. Under these circumstances, we accept the evidence filed by the assessee and allow the claim that the income in question is Long Term Capital Gain from sale of shares and hence exempt from income tax.”

The scrips in question were the subject matter of adjudication before this Tribunal. The Kolkata Bench of the ITAT in a number of decisions have, on similar facts and circumstances of the case, decided the issue in favour of the assessee. We list some of these decisions:-

- Shri Gautam Kumar Pincha vs. ITO, ITA No. 569/Kol/2017, dt. 15/11/2017
- ITO vs. Shri Shaleen khemani, ITA No. 1945/Kol/2014, dt. 18/10/2017
- Mahendra Kumar Baid vs. ACIT, Circle-35; ITA No. 1237/Kol/2017; order dt. 18/08/2017
- Kiran Kothari HUF vs. ITO, ITA No. 443/kol/2017, order dt. 15/11/2017

The Hon“ble Jurisdictional High Court had in the following cases, upheld the claim of the assessee:-

- CIT vs. Shreyashi Ganguli (ITA No. 196 of 2012) (Cal HC) 2012 (9) TMI 1113
- CIT vs. Rungta Properties Private Limited (ITA No. 105 of 2016) (Cal HC)dt. 08/05/2017
- CIT vs. Bhagwati Prasad Agarwal (2009 TMI-34738 (Cal HC) in ITA No. 22 of 2009 dated 29.04.2009

6.2. Consistent with the view taken therein, as the facts and circumstances of this case are same as the facts and circumstances of the cases of Navneet Agarwal (supra), we delete the addition made u/s 68 of the Act, on account of sale of shares in the case of both the assessees. The consequential addition u/s 69C is also deleted. Accordingly both the appeals of the assessee are allowed.

7. In the result, appeal of the assessee is allowed.

Kolkata, the 25th day of July, 2018.

Sd/-

[J. Sudhakar Reddy]
Accountant Member

Dated : 25.07.2018”

7.8. It would be pertinent to address the case law relied upon by the Id DR before us on the decision of Hon’ble Bombay High Court (Nagpur Bench) in the case of Sanjay Bimalchand Jain vs Pr.CIT (Nagpur) reported in (2018) 89 taxmann.com 196 (Bombay) dated 10.4.2017 on the impugned issue. From the facts of Sanjay Bimalchand Jain supra, we find that (i) in that case, the broker company through which the shares were sold did not respond to AO’s letter regarding the names and address and bank account of the person who purchased the shares sold by the assessee ; (ii) Moreover, at the time of acquisition of shares of both the companies by the assessee, the payments were made in cash ; (iii) The address of both the companies were interestingly the same ; (iv) The authorized signatory of both the companies were also the same person ; (v) The purchase of shares of both the

companies was done by that assessee through broker, GSSL and the address of the said broker was incidentally the address of the two companies. Based on these crucial facts, the Hon'ble Bombay High Court rendered the decision in favour of the revenue. None of these factors were present in the facts of the assessee before us. Hence it could be safely concluded that the decision of Hon'ble Bombay High Court supra is factually distinguishable.

7.9. We find that the Hon'ble Jurisdictional High Court in the case of CIT vs Mukesh Ratilal Marolia in ITA No. 456 of 2007 dated 7.9.2011 had held as under:-

5. On further appeal, the ITAT by the impugned order allowed the claim of the assessee by recording that the purchase of shares during the year 1999-2000 and 2000-2001 were duly recorded in the books maintained by the Assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were in-fact transferred to the name of the Assessee. In these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.

6. Similarly, the sale of the said shaers for Rs 1,41,08,484/- through two Brokers namely, M/s Richmond Securities Pvt Ltd and M/s Scorpio Management Consultants Pvt Ltd cannot be disputed, because the fact that the Assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s Richmand Securities Pvt Ltd regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s Richmand Securities Pvt Ltd held that the sale transaction was genuine.

7. In these circumstances, the decision of the ITAT in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer was not justified in holding that the amount of Rs 1,41,08,484/- represented unexplained investment under section 69 of the Income Tax Act, 1961 cannot be faulted.

8. In the result, we see no merit in this Appeal and the same is dismissed with no order as to costs.

7.10. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we hold that the Id CITA was not justified in upholding the action of the Id AO in bringing the long term capital gains on sale of shares of SRK Industries Ltd in the sum of Rs 2,26,36,372/- as unexplained income of the assessee treating the same as just an accommodation entry. The Id AO is directed to grant exemption u/s

10(38) of the Act in the sum of Rs 2,26,36,372/- to the assessee. Accordingly, the ground raised by the assessee is allowed.

8. Both the parties before us agreed that the facts in ITA No. 694/Mum/2018 in the case of Shri Shashikant B Mhatre (HUF) are identical to that of Smt Geeta Khare supra except with variance in figures and name of the scrip that was dealt with. Both the parties before us stated that identical reasoning was given by both the lower authorities for denying the claim of exemption u/s 10(38) of the Act to the assessee. The decision rendered in the case of Smt Geeta Khare would apply with equal force for this assessee also and accordingly, the ground raised by the assessee in ITA No. 694/Mum/2018 is allowed.

9. In the result, both the appeals of the assessee are allowed.”

8. We have also perused the other decisions relied by the Ld. A.R. and found that the case of the assessee is squarely covered by the aforesaid decisions. Considering the facts of the case in the light of various judicial orders as cited above, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition of Rs.5,46,21,248/-.

9. The issue raised in ground No.3 is against the confirmation of addition of Rs.1,36,553/- being 0.25% of the total sale consideration as commission.

10. Since the issue is consequential to one as decided above in ground No.1 & 2, the ground No.3 is also allowed. The AO is directed to delete the addition.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22.11.2021.

Sd/-
(Amarjit Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 22.11.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.